

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 150 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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ANVARL @ ANUDO A.PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MS BANNA S DUTTA for Petitioner  
Mr.A.J.DESAI, A.P.P. for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE R.BALIA.

Date of decision: 24/09/96

ORAL JUDGEMENT(Per Pandya,J.)

The accused-appellant of Criminal Case no.6/1990 came to be convicted of offences under Section 20(b) of the Narcotic Drugs & Psychotropic Substances Act,1985 (hereinafter referred to as the NDPS Act) by the learned Sessions Judge of Kutch at Bhuj by his order dated

24-1-1992. As a result the learned Judge awarded 10 years rigorous imprisonment and a fine of Rs.1 Lakh and in default to undergo one more year of imprisonment.

The facts leading to the aforesaid result at the end of the trial are that on 30th April, 1990, complainant- a P.I. of the State police had received information about two persons being in the process of bringing contraband article(narcotic) for the purpose of selling. Alongwith Panchas, therefore, complainant-P.I. and members of the raiding party went at the likely place from where the accused were to pass and waited there. Their wait was rewarded. Two persons on seeing the waiting party started running away and the police party succeeded in catching hold of them,.

In the course of search, 450 gms. of a material which was ultimately found to be charas was recovered from the present accused-appellant and after taking out for the purpose of analysis sample weighing roughly 10 gms., rest of the article was seized, sealed and was kept as muddammal.

The charge came to be framed under the aforesaid section and after elaborate trial, the learned trial Judge by his fairly long and reasoned judgment came to the aforesaid conclusion of guilt and awarded the aforesaid sentence.

The main point urged on behalf of the appellant by the learned Advocate Miss Dutta is that the accused has got a right under Section 50 of the NDPS Act of being informed that he be searched by a Gazetted Officer or a Magistrate and when the members of the raiding party has not complied with this mandatory requirement as provided under Section 50 of the NDPS Act, the prosecution must fail.

Learned Advocate for the appellant relies on the judgment given in the case of STATE OF PUNJAB VS. BALBIR SINGH, AIR 1994 S.C.1872 for the purpose. At Head Note :B, paragraphs 17,21 and 26, the learned Judges of the Supreme Court have categorically expressed themselves to the effect that compliance with the provisions of Section 50 read with section 41 and 42 is an imperative requirement. Later on, no doubt, as rightly pointed out by learned A.P.P. Mr.A.J. Desai, appearing for the State, there are Supreme Court pronouncements that each case has to be evaluated on its own merits and facts and circumstances attendant to it should be borne in mind. In a given case after the contraband article is found

unexpectedly or if it was not at all possible to contact either a Gazetted Officers or a Magistrate and so on the case may turn on that. For this purpose, Mr. Desai, relied on the case of STATE OF HIMACHAL PRADESH VS. PIRTHI CHAND AND ANR. reported in 37(2) G.L.R.699. As we went through the judgment we found that that is mainly with regard to admissibility of evidence on the ground whether the evidence is relevant or not. So far as the relevance of the material thus gathered even in violation of Section 50 of the NDPS Act is concerned it will ofcourse be governed by the provisions of the Evidence Act, and therefore, the prosecution may press into service the relevant provision of the Evidence Act. However, in the instant case, it is not even remotely suggested that the material thus gathered by the search party should be used. In fact, it has been allowed to be used and it is not the grievance of either of the sides that the evidence has been shut out or from the point of view of the accused- appellant that the matter should not have been permitted by the trial Court to be admitted in evidence. We are concentrating only on the fact whether the said mandatory requirement had been complied with or not. Hence, the said decision in PIRTHI CHAND'S case will not help the prosecution.

Similar is the view expressed by the Division Bench of the Honourable Supreme Court in the case of STATE OF PUNJAB VS. LABH SINGH, JT 1996(6)S.C. p.598. Again emphasizing that each case has to be considered on its own setting when the learned Judge has found that accused were acquitted for non compliance of requirement of Section 50, the learned Judge did not interfere with the order of acquittal in view of the long delay of ten years.

In paragraph 5 of the judgment in LABH SINGH'S case various possibilities as to non availability of either a Gazetted Officer or a Magistrate have been emphasized. In the instant case, it is not even remotely suggested that any such situation has prevailed. As against that Ms. Dutta relied on the decision rendered in the case of RAGHBIR SINGH VS. STATE OF HARYANA, 1996 SCC (Criminal) p.266 where a Bench of three learned Judges of the Honourable the Supreme Court while confirming the view expressed by the Honourable Supreme Court in 1995(3) SCC 610 that Court must satisfy itself whether the requirement of Section 50 is satisfied or not, has clarified that the requirement is to inform the accused and thereby no choice is left to the accused whether he has to be examined by a Gazetted Officer or a Magistrate. Under the circumstances we accept the

submission of the learned Advocate appearing for the accused-appellant and allow the appeal. The accused is acquitted. From the record it appears that the accused has not paid the fine. Therefore, there is no question of ordering refund thereof. The accused is ordered to be released forthwith if not required for any other purpose.

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